Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5458

EDWARD HORSLEY,

PETITIONER

-VS-

STATE OF ALABAMA,

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

I.

WHETHER THE ALABAMA DEATH PENALTY STATUTE WHICH PRECLUDES JURIES FROM CONSIDERING LESSER INCLUDED OFFENSES RESULTS IN A VIOLATION OF THE EIGHTH & FOURTEENTH AMENDMENTS.

II.

WHETHER ALABAMA'S PROCEDURE OF DEFERRING THE TRIAL JUDGE'S CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL AFTER THE JURY HAS IMPOSED THE DEATH SENTENCE IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

III.

WHETHER THE ALABAMA DEATH PENALTY STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

IV.

WHETHER THE STATE OF ALABAMA HAD JURISDICTION TO TRY PETITIONER FOR AGGRAVATED ROBBERY.

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EDWARD HORSLEY,

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-VS-

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BRIEF AND ARGUMENT IN OPPOSITION
TO PETITION FOR WRIT OF
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BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming the petitioner's conviction and sentence has not yet been reported. The opinion of the Supreme Court of Alabama affirming the conviction and sentence and the denial of rehearing also have not been reported.

JURISDICTION

The Petitioner invokes jurisdiction pursuant to 28 U.S.C. §1247(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

STATUTES INVOLVED

Code of Alabama 1975, §13-11-1 et seq.

Code of Alabama 1975, § 15-2-4

STATEMENT OF THE CASE

Petitioner, Edward Horsley, was indicted under Code of Alabama 1975, §13-11-2(a)(2) for the capital offense of "robbery...when the victim is intentionally killed..."

Petitioner's trial began on November 14, 1977. On November 15, 1977 the jury returned a verdict of guilty as charged in the indictment.

Petitioner's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals on October 3, 1978. That court denied Petitioner's Application for Rehearing on October 31, 1978.

The Supreme Court of Alabama affirmed Petitioner's conviction and sentence on June 1, 1979. That court denied Petitioner's Application for Rehearing on July 6, 1979.

SUMMARY OF THE ARGUMENT

The Alabama death penalty statute does not permit a jury to return a guilty verdict for a lesser included offense and in that way effectively prevents the infrequent and arbitrary imposition of the death sentence which the Constitution forbids.

The Alabama statute's provision for deferring the trial judge's consideration of aggravating and mitigating circumstances until after the jury has imposed the death sentence is not violative of the Eighth and Fourteenth Amendments.

Moreover, the Alabama statute allows the judge, as sentencing authority to consider at the sentencing hearing any evidence which tends to show that the death penalty is not appropriate in a given case. The Alabama Supreme Court has

interpreted the statute to allow the sentencing judge to hear the broadest possible range of evidence and argument in mitigation. This interpretation is authoritative and satisfies the requirements of Lockett v. Ohio, Proffitt v. Florida, and Jurek v. Texas.

Finally, venue and jurisdiction to try Petitioner lay in Alabama.

ARGUMENT

I.

THE ALABAMA DEATH PENALTY STATUTE WHICH PRECLUDES JURIES FROM CONSIDERING LESSER INCLUDED OFFENSES DOES NOT RESULT IN A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Under the Alabama death penalty statute's carefully drafted definitions of capital crimes there are no lesser included offenses. Code of Alabama 1975, §13-11-2(a). While this Court has not held in post-Furman cases that the preclusion of lesser included offenses is constitutionally required, it does not follow that such preclusion is an unconstitutional method of seeking to obtain the type of sentencing which various members of the Court felt important in Furman.

In Furman, the way in which death penalty statutes had been applied in the past was held to be unconstitutional, because that application was "pregnant with discrimination" 408 U.S. at 257 (Justice Douglas, concurring); permitted the death penalty to be "wantonly" and "freakishly" imposed, 408 U.S. at 310 (Justice Stewart, concurring); and resulted in the death penalty being imposed with "great infrequency" and afforded "no meaningful basis for distinguishing the

few cases in which it [was] imposed from the many cases in which it [was] not", 408 U.S. at 313 (Justice White, concurring). The preclusion of lesser included offenses is the most effective means of ensuring that de facto jury discretion does not make the operation of a death penalty statute "pregnant with discrimination" because it is imposed with such "great infrequency" as to be "wantonly" and "freakishly" imposed. Because of this, preclusion of lesser included offenses avoids the pitfalls denounced in Furman and thereby promotes sentencing that is consistent with the Constitution.

Furthermore, no capital punishment system which permits a jury to return a conviction on a lesser included offense in a capital case will ever attain the full advantage of judicial sentencing. As long as the jury has the easy de facto discretion which the availability of lesser included offenses provides, the greater consistency of judicial sentencing will be undermined. See Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion).

Moreover, any capital sentencing scheme in which jurors are tempted by the availability of lesser included offenses merely ignores the problem of de facto jury discretion.

In his brief petitioner speculates that the preclusion of lesser included offenses might cause juries to convict a defendant of a capital offense when that defendant was merely guilty of a lesser offense which should have been but was not included. Such speculation is unpersuasive for three reasons. First of all, there is absolutely no indication or evidence that such cold-hearted irresponsibility has ever occurred or will ever occur.

The second reason why petitioner's argument is unpersuasive is that historical experience directly contradicts it. The available evidence indicates that because of compassion, juries

tend, if anything, to resolve such questions in favor of the accused. The jury nullification data relied upon to strike down mandatory death penalty sentences in Woodson v. North Carolina, 428 U.S. 280, 289-293 (plurality opinion), demonstrates the extent to which juries will go to spare defendants from capital punishment. In the face of such evidence, petitioner's argument that jurors would callously elect to send to his death a man whom they concluded was not guilty of a capital offense is without any support.

The third reason why petitioner's argument is unpersuasive is that it incompletely states the facts. If the jury finds that a defendant is guilty of some offense other than the capital offense charged, the jury is not faced with what petitioner calls the "Hobson's choice" of acquitting a criminal or of returning a verdict sentencing a man to death for a capital offense of which he is not guilty. Instead, the Alabama statutes specifically provide that the jury can refuse to agree on a verdict or on the sentence of death and thereby cause a mistrial. Code of Alabama 1975, §13-11-2(c). In his brief, petitioner omits all mention of this important safety-valve the existence of which totally destroys his "Hobson's choice" argument.

Hence, the inclusion of lesser included offenses in a capital sentencing system is not constitutionally required. Preclusion of lesser included offenses serves important constitutional goals, and there is no evidence whatsoever that it will result in the conviction of a defendant who is not guilty of a capital offense. All of the historical evidence concerning the behavior of juries in capital cases is to the contrary. In any event, the Alabama statutory system contains an important safety-valve in that a mistrial can be declared if a jury is unable to agree on a verdict or on the sentence of death. After such a mistrial, the defendant can be retried for the capital offense or he can be reindicted for a non-capital offense.

Finally, while this Court has granted a petition for a writ of certiorari on this very issue, the issue has been limited to cases where the evidence would have supported a verdict of guilt of a lesser included non-capital case.

However, at no point in his argument does Petitioner contend that the evidence in his case would have supported a verdict of guilt of a lesser included offense.

Hence, the petition for a writ of certiorari should not be granted on this issue.

II.

ALABAMA'S PROCEDURE OF DEFERRING THE TRIAL JUDGE'S CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL AFTER THE JURY HAS IMPOSED THE DEATH SENTENCE IS NOT VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner contends that the Alabama death penalty statute is unconstitutional in that it places the trial judge in the position of having to override the jury's death sentence, thus subjecting him to the brunt of public outcry should he decide the death penalty to be inappropriate.

However, while Petitioner states that such a procedure is fraught with peril, he offers no concrete empirical evidence to support this conclusion.

Moreover, there is absolutely no indication or evidence that any trial judge has left a death sentence intact in a case where life imprisonment without parole was warranted. To the contrary, the trial judge is statutorily required to weigh the aggravating and mitigating circumstances and if the court upholds the death sentence, the judge must list the aggravating circumstances which support the sentence and any mitigating circumstances which are insufficient to outweigh the aggravating circumstances. Hence, this procedure eliminates a sentence founded on fear or popular opinion.

Furthermore, historical experience directly contradicts the fear that trial judges will not perform their statutory

duty. See Jacobs v. Alabama, Ala., 361 So. 2d at 654, where the majority opinion of the Alabama Supreme Court stated:

> In his original dissent, Mr. Justice Jones states: "The majority's judicial review 'cure all' obtains even less credence when it is understood that such guided discretion is placed upon a popularly-elected official." He supports his conclusion dehors the record by citing an example in footnote 3 of his dissent, and states that public comment or clamor will influence trial judges to ignore mitigating circumstances. We hesitate to go outside the record to answer Mr. Justice Jones' conclusion, but we feel constrained to do so, since he infers that elected judges will not do their sworn duty, and will be unduly swayed by public pressure. Since Mr. Justice Jones made his observation, we have been informed that the same trial judge who conducted the trial in the case mentioned by Justice Jones has again sentenced a defendant to life without parole. State v. Eddie Bernard Neal, #78-00693, decided August 7, 1978, 10th Judicial Circuit. We are also informed that a jury in Covington County acquitted a defendant charged under the capital felony statute. State v. David Bonner, #CC 7825, decided April 19, 1978, 22nd Judicial Circuit. Consequently, any suggestion that either judges or jurors will fail to do their sworn duty because of public comment or clamor should not be entertained.

The fact that a trial judge, who was subjected to what Petitioner and Justice Jones perceived to be such an outcry of public criticism, later sentenced another defendant to life without parole indicates that trial court judges will not be unduly influenced by public opinion.

The sentencing decisions which trial court judges have made under Alabama's new capital punishment act further evidence that public pressure will not prevent judges from pronouncing non-capital sentences when they feel that the mitigating and aggravating circumstances in a particular case do not justify the death penalty. Under Alabama's new Death Penalty Act, over 45 sentence hearings have been held after a defendant pleaded not guilty and was convicted by a jury. In at least 8 of these cases, the trial judge has sentenced the defendant to life imprisonment without parole instead of to death. Hence, Petitioner's argument is without merit.

III

THE ALABAMA DEATH PENALTY STATUTE PERMITS CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

In Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978), a plurality of the United States Supreme Court held that:

> ...we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. (footnotes omitted).

A statutory system that permitted broad consideration of mitigating factors was deemed necessary because:

> ...a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. ...98 S. Ct. at 2965.

The opinion further stated that in order to meet constitutional requirements, a state death penalty must not preclude consideration of relevant mitigating factors. Lockett v. Ohio, 98 S. Ct. at 2967.

The Alabama statutory sentencing procedure in capital cases, as construed by the Alabama Supreme Court, does not run afoul of the requirements laid down by the plurality opinion in Lockett v. Ohio, supra. As required in that opinion, the Alabama sentencing procedure allows the sentencing authority to consider as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

Under Alabama's death penalty act, if the jury finds the defendant guilty, the trial judge is required to hold a separate sentence hearing for the purpose of determining the appropriate punishment for that specific case. Code of Alabama 1975, §13-11-3. The statute states that the purpose of this sentence hearing is, "...to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." At the sentence hearing, the sentencing authority is in no way precluded from hearing all evidence showing relevant mitigating factors, because the statute itself provides that: "In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating and mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7." Code of Alabama 1975, §13-11-3 (emphasis added).

Alabama's death penalty statute further provides that any evidence which the trial court deems to have probative value may be received. Section 13-11-3. As the statutory language itself makes clear, the sentencing authority in Alabama is in no way precluded from considering as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, or any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

The case of Proffitt v. Florida, 428 U.S. 242 (1976), likewise demonstrates the constitutionality of Alabama's sentencing provision. The Florida statutory provision, which was upheld in Proffitt, supra, Fla. Stat. Ann. §931.141(6)

entitled MITIGATING CIRCUMSTANCES, provides that "Mitigating circumstances shall be the following: ..."and then goes on to list seven statutory mitigating factors. The Alabama provision, Code of Alabama 1975, §13-11-7, entitled MITIGATING CIRCUMSTANCES, provides that, "Mitigating circumstances shall be the following: ..."and then goes on to list seven statutory mitigating factors. Not only is the introductory language in these two corresponding provisions identical, but the actual mitigating circumstances themselves in the Florida and Alabama statutes are verbatim identical.

In distinguishing the Florida statute which was upheld in Proffitt v. Florida, supra, from the Ohio statute which was struck down in Lockett v. Ohio, supra, the Lockett plurality observed:

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. ...98 S. Ct. at 2965-2966.

The essence of petitioner's argument in the present case is that that assumption cannot be made about Alabama's death penalty statute. Petitioner's argument is that in Alabama the sentencing authority can only consider those mitigating circumstances which are set out in Code of Alabama 1975, §13-11-7 in determining whether a sentence of death should be imposed on a particular defendant. Petitioner's argument is that since section 13-11-4 requires that the sentencing authority must weigh the mitigating circumstances which are enumerated in section 13-11-7, and since that section says that certain considerations "shall be" the mitigating circumstances, then the sentencing authority is limited in considering the mitigating factors.

Petitioner's argument ignores the provisions of section 13-11-3, which were quoted on page 11 of this brief, above. Even more importantly, petitioner's argument ignores the construction and interpretation which have been given the statutory provisions by the Alabama Supreme Court.

The construction and interpretation which have been given to the relevant statutory provisions by the Alabama Supreme Court make it clear that this Court need not depend upon any assumptions about the matter. No assumption is necessary, because the Alabama Supreme Court has explicitly ruled that the statutory mitigating factors set out in the Alabama death penalty statute are not exclusive.

Jacobs v. State, 361 So. 2d 640 (Ala. 1978), was the first case which the Alabama Supreme Court decided concerning the Alabama death penalty statute. After the Alabama Supreme Court had issued its opinion in that case, the United States Supreme Court handed down its decision in Lockett v. Ohio, 98 S. Ct. 2954 (1978). Jacobs then asked the Alabama Supreme Court to reconsider its decision in his case in light of the Lockett v. Ohio, supra, decision. In considering and denying Jacobs' application for a rehearing, the Alabama Supreme Court had an opportunity to interpret and construe the sentencing provisions of the Alabama death penalty statute in light of the United States Supreme Court holding in Lockett v. Ohio, supra. The Alabama Supreme Court extended its original opinion in Jacobs v. State, 361 So. 2d at 652-654, and in doing so held as follows:

> "We deny petitioner's application to rehear this case but we point out that we have examined the cases of Bell v. Ohio, ___ U.S. ___, 98 S. Ct. 2297, 57 L. Ed. 2d 1010 and Lockett v. Ohio, ___ U.S. ___, 98 S. Ct. 2954, 57 L. Ed. 2d 973, decided after petitioner's application for a rehearing was filed, and we conclude that those cases do not invalidate Alabama's sentencing scheme in death cases. Alabama's sentencing scheme specifically provides, in part:

> '...In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and it shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. ...(Emphasis added) (§ 13-11-3, Code, 1975).' "

The Alabama Supreme Court itself added the emphasis to that part of the statute. In view of that provision of the statute, the Alabama Supreme Court, on rehearing, concluded:

> It is readily apparant, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances, and does not contain the deficiencies the court found were inherent in Ohio's scheme. (Emphasis in original.)

This interpretation and construction of the sentencing provisions in Alabama's death penalty statute were reaffirmed in Ex Parte: Recardo Cook, Ala., 369 So. 2d 1521 (1978). In Ex Parte: Recardo Cook, supra, the Alabama Supreme Court remanded the case to the trial court for another sentencing hearing, because the one which had been conducted did not comport with the requirements outlined in Lockett v. Ohio, supra, and Jacobs v. Alabama, supra. The Alabama Supreme Court recognized, based upon the plurality's opinion in Lockett the necessity of the sentencing authority considering any relevant aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffers as a basis for a sentence less than death. In remanding for a new sentence hearing in Ex Parte: Recardo Cook, the Alabama Supreme Court stated:

> Lockett was not released until after this court upheld Alabama's Death Penalty Act in Jacobs v. State. Nevertheless, on rehearing in Jacobs we considered the possible impact of Lockett on Alabama's statute. In an extended opinion we noted that Lockett does not invalidate Alabama's sentencing scheme in death cases since §13-11-3, Code of Alabama 1975, specifically allows any relevant evidence in mitigation to be presented at the sentencing hearing....

Therefore, the Alabama Supreme Court has construed Alabama's sentencing scheme in capital cases to allow the sentencing authority to consider any relevant evidence in mitigation, and this complies with the holding in Lockett v. Ohio, supra.

Because the Alabama Supreme Court has interpreted Alabama's death penalty statute to permit consideration at the sentence hearing on non-statutory mitigating circumstances, that settles the matter. The Alabama Supreme Court and not petitioner is the authoritative source for the proper construction and interpretation of the Alabama death penalty statute. E.g., Brown v. Ohio, 432 U.S. 161 (1977); Garner v. Louisiana 368 U.S. 157 (1961).

Because the sentencing determination under Alabama's statute includes non-statutory mitigating circumstances, the Alabama Supreme Court has instructed trial court judges, who are the sentencing authorities, to have as much information about a defendant as possible. In Ex Parte: Recardo Cook, supra, the Alabama Supreme Court stated:

> In conducting these hearings trial judges should keep in mind their ability to order pre-sentence investigations and psychiatric evaluations to obtain a full picture of the defendant.

The Alabama Court of Criminal Appeals has gone even further. In remanding cases for new sentence hearings, that Court has twice required trial court judges to order a pre-sentence report to be made and considered. Willie Lewis Mack v. State, ___So. 2d __(Ala. Cr. App. July 24, 1978) Ms. Op. 46; Herbert Lee Richardson v. State, ___So. 2d__(Ala. Cr. App. October 3, 1978), Ms. Op. at 33.

Not only has the Alabama statute been interpreted by the Alabama appellate courts to allow consideration of non-statutory mitigating circumstances, but trial court judges have actually administered it in such a fashion. In Baldwin v. State, Ala. Cr. App., 372 So. 2d 26 (1978), Ala., 372 So. 2d 32 (1979), the Alabama Court of Criminal Appeals noted with approval that at the sentence hearing in that case, "The

appellant was given the opportunity to present any mitigating circumstances which he desired to the trial court." The Court noted the same thing in Edward Horsley v. State, ___So. 2d ___ (Ala. Cr. App. October 3, 1978) Ala., ___So. 2d___ (1979) Ms. Op. at 22.

Neal v. State, Ala. Cr. App., 372 So. 2d 1331 (1979), is a case in which the trial court judge not only considered a non-statutory mitigating circumstance but gave significant weight to it in sentencing the defendant to life without parole. After setting out some statutory mitigating factors he found to be present in the case, the trial court judge listed and considered the following non-statutory mitigating circumstance:

> While there was sufficient evidence for the jury to find Eddie Barnard Neal guilty, there was not the depth of evidence against him which this Court must insist upon for the penalty of death to be invoked.

In summary, the Alabama death penalty statute expressly permits a trial court judge to consider any matter that he deems relevant to sentencing. The statute, as interpreted by the Alabama Supreme Court, does not prohibit a trial court judge from considering non-statutory mitigating circumstances. The Alabama appellate courts have instructed trial court judges to consider any and all evidence that is relevant to mitigation of the crime. Trial court judges have given convicted defendants the opportunity to present any relevant evidence in mitigation.

IV.

THE STATE OF ALABAMA HAD JURISDICTION TO TRY PETITIONER FOR AGGRAVATED ROBBERY.

The Petitioner argues that the State of Alabama lacked jurisdiction to try him for aggravated robbery.

However, the Respondent submits that the Alabama Supreme Court was correct in its holding that the crime of robbery when the victim is intentionally killed is a single offense beginning with the act of robbing or attempting to rob and culminating with the act of intentionally killing the victim. While it is true that the offense consists of two elements, robbing and intentionally killing, it does not consist of two separate offenses. Thus, the offense was consummated when the victim was killed in Monroeville, Alabama.

Moreover, Code of Alabama 1975, 15-2-4 provides:

> When the commission of an offense commenced elsewhere is consummated within the boundaries of the State of Alabama, the offender is liable to punishment in Alabama, although he was out of the state at the commission of the offense charged if he consummated it in this State through the intervention of an innocent or guilty agent or by any other means proceeding directly from himself; and venue in such case is in the county in which the offense was consummated, unless otherwise provided by law.

Thus, by virtue of the aforementioned statute, clearly the trial court had jurisdiction to try appellant.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing on Hon. Russell, J. Drake, Drake & Pierce, 1509 University Blvd., Tuscaloosa, Alabama 35401 by placing same in the U.S. Mail, postage prepaid this 6th day of November, 1979.

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